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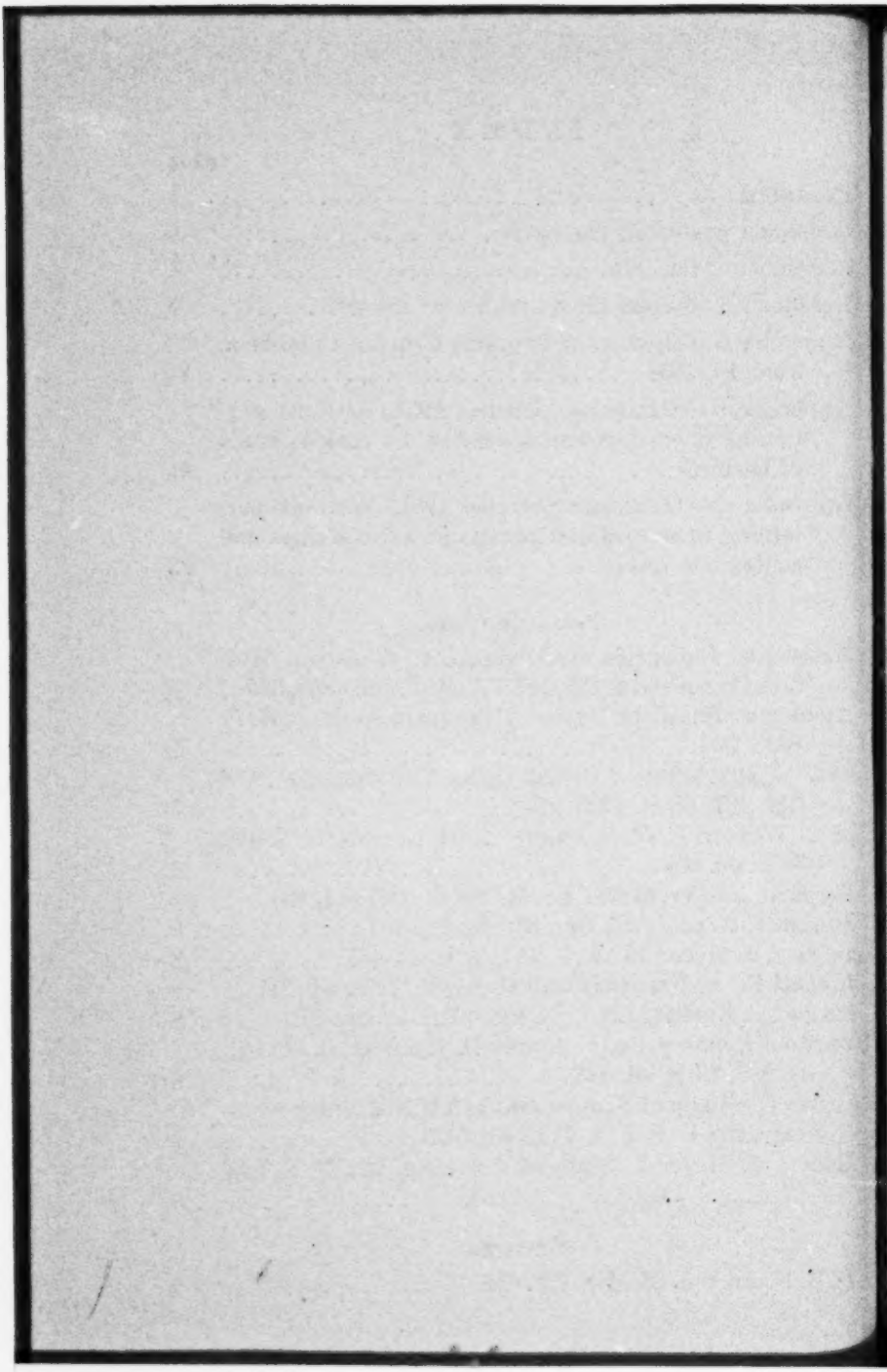

IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1954.

No. .....

Martin L. Dowell, D. F. Gerstenberger, Mabel Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy, Marguerite M. Miller, ***Petitioners,***

vs.

The City of Tulsa, a municipal corporation, C. M. Warren, mayor, Glenver McConnell, J. L. Jones and W. W. Jenkins, commissioners thereof, ***Respondents.***

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Martin L. Dowell, D. F. Gerstenberger, Mabel Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy and Marguerite M. Miller, the petitioners herein, pray that a Writ of Certiorari be issued to review final judgment of the Supreme Court of Oklahoma reported in 273 P. (2d) 859, entered on June 15, 1954, and which became final on July 13, 1954, upon which date an order was entered denying a timely and duly considered petition for rehearing filed on June 30, 1954, a copy of the opinion of said court is hereto appended, marked Appendix A and made a part hereof.

On October 11, 1954, the Honorable Tom C. Clark, Associate Justice, signed an order extending the time for filing petition for writ of certiorari to and including October 25, 1954.

The ground on which jurisdiction of this Court is invoked is that petitioners were deprived of individual rights and personal liberties granted them under the First and Fourteenth Amendments to the Constitution of the United States.

The jurisdiction of this Court to review the judgment by writ of certiorari is conferred by 28 U. S. C. A., Sec. 1257(3).

Questions Presented for Review.

I. Did the court err in upholding the power of the state to undertake the regulation and control of disease, regardless of the nature of such disease and without regard to whether it was contagious or infectious, or likely to endanger the health of the public unless regulated and controlled only in the manner prescribed by a subordinate political agency assuming to exercise exclusive jurisdiction, and in sustaining the exercise of coercive measures to compel acceptance of such treatment by all persons within the jurisdiction? Did such action, the effect of which was to deny the right of any person to determine his course with respect to the kind of treatment, if any, amount to an invasion of the personal liberty guaranteed to every citizen by the Fourteenth Amendment to the Constitution?

II. May a subordinate agency of the state, in the absence of a grant of express authority by the lawmaking body of the state, under a claim of implied police power, compel the individual citizens to take medical treatment for

the control of noncontagious maladies in the absence of a public emergency endangering the health and safety of the general public without violating the liberties guaranteed such citizens under either the First or Fourteenth Amendments to the Federal Constitution?

III. Is the enactment of statutes by the legislature compelling individuals engaged in various lines of business, such as, dairies, restaurants, bakeries, hotels, bottling works, flour and other food stuff factories, to take necessary steps to insure sanitary operations thereof, a sufficient declaration of policy to authorize a subordinate agency of the state to undertake the regulation and control of disease not of a dangerous, infectious, or contagious nature? A copy of such statutes is hereto appended, marked Appendix B and made a part hereof.

IV. If question number three be construed to be such a declaration of policy, is it not an unlawful delegation of legislative power?

Statement of the Case.

The City of Tulsa enacted an ordinance authorizing the Commissioner of Waterworks and Sewerage and the Water Department to institute fluoridation of the water supply of the City of Tulsa. Petitioners, individual taxpayers, instituted an action in the District Court of Tulsa County, Oklahoma, to enjoin the City of Tulsa and its officers and agents from introducing fluorine into the common source of water supply which is owned, operated and controlled by said city. In their said petition petitioners raised the federal question by pleading the First and Fourteenth Amendments to the United States Constitution. The cause was submitted to the trial court largely upon an agreed set of facts wherein it was stipulated that the ordinance in

question was passed by the City of Tulsa after public hearings and after being recommended by the Oklahoma State Board of Health, Tulsa County Dental Society, Tulsa County Medical Society, The Board of Health of the City of Tulsa and the Utility Board of the City of Tulsa; that the application of fluorides would be subject to the control and supervision by the Oklahoma State Department of Health. That the purpose of fluoridation was to reduce dental caries in children under twelve years of age; that tests show a substantial reduction of decay on the teeth of such children after fluoridation has been conducted for several years; that the effect of fluoridation on persons over twelve had not been determined; that the amount of water consumed by the inhabitants of Tulsa for drinking and cooking purposes was a very small part of the total consumed; that there was no other water company supplying water to the citizens of Tulsa, but bottled water not containing fluorides was available for purchase, that fluorides might be purchased elsewhere by persons desiring to use them to prevent tooth decay; that fluorides were present in the natural water supply of some cities.

Dr. Paul Haney, Superintendent of Health of the City and County of Tulsa, testified that purchasing fluorides elsewhere was not practical as children would not be getting fluorides while they were at school, did not consider it mass medication but considered it mass feeding.

Upon hearing the matter, the trial court found that the ordinance did not violate and impair the personal rights and liberties guaranteed petitioners under either the First or Fourteenth Amendment to the Constitution of the United States, and that the City of Tulsa had the power to enact the ordinance in question as the same was necessary for the public health of the inhabitants of the City of Tulsa

and entered judgment for the respondents denying petitioners' prayer for an injunction. Upon appeal to the Supreme Court of Oklahoma, the judgment of the trial court was affirmed.

Reasons Relied Upon for Allowance of the Writ.

The decision of the Oklahoma Supreme Court involves a federal question of substance not theretofore determined by this Court in that this Court has never recognized the right of a state to regulate or control diseases or maladies not of an infectious, contagious or dangerous nature. This Court has held that a state may control and regulate contagious, infectious or dangerous diseases for the reason that the welfare of the general public is involved and that individual rights and liberties in such instances must yield to the welfare of the general public. But in all such cases the choice of treatment for such diseases as well as the choice of whether to take any treatment at all, is left to the individual citizen as a matter of personal right.

That the clear import of the language of the statutes cited by the Oklahoma Supreme Court in its opinion as declaring a legislative policy to deal with noncontagious disease, appended hereto as Appendix B, indicates nothing more than a purpose on the part of the state to compel individuals engaged in the various lines of business to which the statutes relate, to take necessary steps to insure sanitary operation thereof, or to prevent the imposition of fraud in the conduct of such operations and that none of said statutes even remotely suggest a purpose to require the state to take any steps in its own behalf to bring about the desired end.

Petitioners contend that the only legislative policy with respect to the regulation and control of diseases is to be

found in other statutes declaring it, and that the same is thereby restricted in its scope to the regulation and control of contagious and infectious diseases, and those which from their nature would be dangerous to the public health unless controlled. Said statutes are appended hereto as Appendix C.

Municipalities have initiated and are placing in operation plans for the control or cure of noncontagious disease. The movement is apparently gaining headway. Such plans require the use of public facilities in their operation. The action of respondents here, in initiating the project complained of by petitioners, evidences the general plan of operation. The questions presented here are certain to arise wherever like activities are taken.

The objective is not, as in the case of epidemics, to prevent the rapid spread of diseases by reason of their contagious or infectious nature. The malady, if such it is, which respondents would control, is admittedly not dangerous by reason of any tendency to spread because contagious or infectious. Any harmful effect is confined to the victim. No claim is made that any public danger is present attributable to spread of the disease through contact with those suffering from it. It is self evident that if in the case of noncontagious disease, like tooth decay, political agencies, such as cities and towns, may employ their facilities to deal with it, then under the same authority, they may undertake like regulation, control or cure of any other disease, without regard to whether failure to regulate or to control it would endanger the public health or safety.

Upon the record here, may respondents set up a noncontagious disease as creating an emergency of such character as warrants them in undertaking the control of it by

prescribing an exclusive method of treatment thereof and employing a public facility to compel the adoption of it, and in justification invoke the doctrine of subordination of personal liberties, and justify the assertion of its authority under a claim that a subordinate agency of the state is possessed of inherent or implied police power, independent of any grant of express authority by the lawmaking body of the state?

The issue here is, may any citizen lawfully entitled to receive water from the common source of supply, be limited in his right by the imposition of the condition that he take medical treatment of the kind prescribed, for the control of a noncontagious malady and subordinate and surrender the liberty to choose the kind of treatment, if any is desired, or wholly reject it, if no treatment is desired?

No legal principles are more firmly settled than that legislative powers may not be delegated to subordinate agencies of the state and that subordinate agencies may not lawfully establish legislative policy under a claim that they possess inherent or implied police power. These principles have heretofore been approved and followed by the Supreme Court of Oklahoma and that court, in the decision here complained of, in departing therefrom does not even by inference express a purpose to overrule the conflicting decisions.

—*Herrin* v. *Arnold*, 183 Okl. 392, 82 P. (2d) 977;

Associated Industries of Oklahoma v. *Industrial Welfare Commission*, 185 Okl. 177, 90 P. (2d) 899, 904;

Atchley v. *Board of Barber Examiners, et al.*, 257 P. (2d) 302;

City of McAlester v. *Grand Union Tea Company*, 186 Okl. 487, 98 P. (2d) 924;

Ex parte Fowler, 85 Okl. Cr. 64, 184 P. (2d) 814, 820.

This Court has consistently followed the same principles.

—*Panama Refinery Co.* v. *Archie D. Ryan, et al.*, 293 U. S. 388, 79 L. ed. 446;

D. C. Weaver, et al., v. *Palmer Bros. Co.*, 270 U. S. 402, 70 L. ed. 654;

Lawson v. *Steele*, 152 U. S. 133, 38 L. ed. 385;

Liggett Co. v. *Baldridge*, 278 U. S. 105, 73 L. ed. 204;

Mugler v. *Kansas*, 123 U. S. 623, 31 L. ed. 205-210;

Pierce v. *Society of Sisters, etc., and Hill Military Academy*, 268 U. S. 510, 69 L. ed. 1070;

Robert T. Meyer v. *State of Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

Among other things the court in the last cited decision said:

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."

In the event it should be decided that municipal corporations may undertake the general control of disease, the source and limits of authority should be declared. It is apparent the situation here presented holds within itself the possibility of increasing complexity if the plans already initiated for the control of one form of noncontagious disease are extended to other types of disease which may appeal to political discretion as proper subjects of like control. Only by judicial declaration defining limits to contemplated action can this be avoided.

Wherefore, petitioners respectfully submit that the writ of certiorari should issue to the end that this Court may review the decision of the Supreme Court of Oklahoma and determine whether that Court has deprived petitioners of rights guaranteed by either the First or Fourteenth Amendments to the Federal Constitution.

Respectfully submitted,

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Attorneys for Petitioners.

Appendix A.

Filed in the Supreme Court of Oklahoma, Jun. 15, 1954; Andy Payne, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 36068.

Martin L. Dowell, D. F. Gerstenberger, Mabel Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy, Merguerite M. Miller, plaintiffs in error, vs. The City of Tulsa, a municipal corporation, C. M. Warren, mayor, Glenver McConnell, J. L. Jones and W. W. Jenkins, commissioners thereof, defendants in error.

SYLLABUS.

1. An examination of the statutes enacted by the Oklahoma Legislature providing various regulations and standards to promote and protect public health renders it manifest that said body's policy of exercising such power of regulation is not restricted to measures for the prevention and control of contagious, infectious or dangerous diseases.

2. To the extent that such power is delegated to it under this State's constitution and statutes, a municipality may by proper ordinance provide for the fluoridation of its water supply without contravening the First and the Fourteenth Amendments of the U. S. Constitution.

3. Record examined and held: The City of Tulsa's Ordinance No. 6565 is a valid exercise of police power to promote the public health as against the contention that there was no sufficient proof of its public necessity; further held, said ordinance does not violate Title 59, O. S. 1951, Secs. 273, 333, 495b and 497, or Title 63, O. S. 1951, Sec. 196.

Appeal from the District Court of Tulsa County; Hon. Elmer Adams, Judge.

Action by certain taxpayers of the City of Tulsa, Oklahoma, as plaintiffs against said City, its Mayor and the Members of its Board of Commissioners as defendants to enjoin enforcement of said City's Ordinance No. 6565. From a judgment for defendants denying said injunction, plaintiffs appeal.

Affirmed.

James B. Coppedge, E. O. Patterson, of Counsel, Tulsa, for Plaintiffs in Error;

Harry M. Crowe, Jr., City Attorney, A. M. Widdows, Tulsa, for Defendants in Error.

BLACKBIRD, J.:

Plaintiffs in error commenced the present action, as plaintiffs, to enjoin defendants in error, as defendants, from enforcing and/or complying with Ordinance No. 6565, passed by the Board of Commissioners of the City of Tulsa, on March 3, 1953, authorizing fluoridation of said City's water supply by its Water Department and Commissioner of Waterworks and Sewerage. The purpose of such fluoridation, as indicated in the ordinance, was "to aid in the control of dental caries" (tooth decay), and by reason of the emergency therein declared to exist for "preservation of the public peace, health and safety," it was provided by Section 4 thereof that the ordinance would become effective upon its passage, approval and publication.

The parties appear here in the same order as they appeared in the trial court, and they will be referred to by their trial designations.

Plaintiffs are individual taxpayers of the City. Their effort to enjoin the enforcement of the Ordinance was based upon the alleged ground that it is invalid. The only alleged reasons for such invalidity which they apparently urged are that (1) the ordinance constitutes an "unwarranted exercise of police power" in violation of the Fourteenth Amendment of the U. S. Constitution; (2) that it is an exer-

cise of power beyond that delegated to the City by the State Legislature; (3) it violates the U. S. Constitution's First Amendment concerning freedom of religion; and (4) it violates Title 63, O. S. 1951, Sec. 196, forbidding the manufacture and sale of "food" to which "fluorine compounds" have been added as the term "food" is defined in Sec. 183 to include "articles of food, meat, drink * * * beverage * * *."

After a trial at which plaintiffs introduced no evidence, but entered into a stipulation with defendants as to certain facts, the court made specific findings against plaintiffs on all of the issues above described and entered judgment denying them the injunction. From said judgment they have lodged this appeal.

With apparent reference to (1) and (3) above, plaintiffs contend under the first two propositions formulated in their briefs that our State Legislature has never established a policy of attempting to regulate or control any disease except those that are "contagious, infectious or dangerous"; and that it could not constitutionally do so. In denying the first part of this contention, defendants point to various statutes enacted by the Oklahoma Legislature, particularly sections appearing under Title 63, O. S. 1951, which they say plainly show that its policy in matters of public health and welfare has never been confined to seeking control, regulation and prevention of contagious, infectious, or dangerous diseases. Among these are provisions for safeguards pertaining to bedding and the germicidal treatment of secondhand materials (Sec. 51, *et seq.*); provisions requiring the injection of "nitrate of silver or other proven antiseptic" into the eyes of newborn infants, for their protection against "Inflammation of the eyes * * *" (ophthalma neonatorum) (Secs. 71-77, incl.); those pertaining to the regulation of milk production and marketing (Sec. 295, *et seq.*); and of hotels, etc. (Sec. 331, *et seq.*); to the regulation of bakeries and other foodstuff factories (Sec. 151); to the regulation of bottling works (Sec. 27, *et seq.*); to the Section (296.2) specifying the vitamin and mineral requirement for flour; and to the statutes creating the State Board

of Health (Tit. 63, O. S. 1951, Sec. 1.1) and creating in the State Health Department a division to be known as the "Division of Preventive Dentistry." (Tit. 63, O. S. 1951, Sec. 41.) In fact, it was apparently in conformity with the provisions of the latter section that said State Department made its study of the fluoridation of public water supplies for controlling dental caries and promulgated certain rules and recommendations, or a policy to govern it in assisting municipalities considering such projects. A written statement of these was introduced in evidence as Defendants' Exhibit 3, and the parties' stipulation of facts as well as Ordinance No. 6565 shows that these recommendations were considered and were to be followed in the fluoridation of the water supply contemplated in the ordinance in accord with certain rules, standards and prerequisites (unnecessary here to set forth) prescribed by the State Board.

In view of the broad terms in which our Legislature has spoken on the subject, we cannot believe that it was intended to restrict its enactment of measures designated to promote the public health and welfare to those designed to prevent the spread of infectious, contagious or dangerous diseases. We think the mere reading of the statutes herein cited and others enacted by our Legislature is sufficient to show that it has not so restricted its policy, and that it has chosen to make many minimum requirements with reference to food, lodging and a myriad of subjects connected with the public health and/or welfare that have no direct connection with or relation to infectious, contagious or dangerous diseases.

The next question then is: Recognizing that such a thing is not against public policy as declared by our Legislature, can the police power delegated to a city by the Legislature be exercised to the extent of what in practical analysis amounts to a compulsory measure requiring people of the city to use or pay for water that is fluoridated in order to control a physical characteristic or weakness which is not an infectious, contagious or dangerous disease? Plaintiffs

say that it cannot—that under the guarantees of freedom contained in the 1st and 14th Amendments to the U. S. Constitution the citizens of Tulsa have a right to be furnished city water not "medicated" or treated with fluorides. We do not agree.

The tests by which such matters are to be governed in two of the cases quoting or expressing them in verbiage most favorable to plaintiffs are *Lawson* v. *Steele,* 152 U. S. 133, 38 L. ed. 385, and *Bowes* v. *Aberdeen,* 58 Wash. 535 (542), 109 Pac. 369, 372. In the first of these it is said:

> "To justify the state in interposing its authority in behalf of the public, it must appear: *First,* that the interests of the public generally as distinguished from those of a particular class, require such interference; and, *second,* that the means are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals."

In the Washington case, it was said:

> "The questions which present themselves in the examination of a safety or health measure are: Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of the Legislature?"

In suggesting negative answers to the above-quoted questions when propounded about Ordinance 6565, it seems to be plaintiffs' position that (1) since it is not contended that Tulsa's water is not pure, or that unless treated with fluorides it will tend to spread contagious disease or that an epidemic of an infectious or dangerous disease is threatened or imminent unless said water is so treated, the exercise of the police power to the extent of interfering with Tulsa

citizens' freedom to purchase and use its water without such treatment cannot be justified; that (2) since the only direct evidence on the matter went no further than showing that drinking fluoridated water reduces caries in the lower-age group of minor persons, such treatment could not be justified as a measure to improve the health or welfare of the public generally; (3) that the evidence tended to show that the same object could be attained by leaving to individuals the treatment of their own drinking water with fluorides on an individual and voluntary basis, as could be attained by requiring the wholesale treatment of the City's entire water supply and therefore that the latter is not "reasonably necessary" to attain that end, thus belying the Ordinance's announced representation or misrepresentation that it is necessary to preservation of the public health and safety. We do not find any of these arguments tenable for the reasons hereinafter set forth. While most of the reported cases that have arisen in the past involved the so-called "purity" or "purification" of municipal water supplies and the regulations upheld with reference thereto were designed to prevent contamination or pollution with consequent epidemics or spread of disease (notice Annotations, 6 A. L. R. 228, and 8 A. L. R. 673; 23 A. L. R. 228; 72 A. L. R. 673), we think the weight of well-reasoned modern precedent sustains the right of municipalities to adopt such reasonable and indiscriminating measures to improve their water supplies as are necessary to protect and improve the public health, even though no epidemic is imminent and no contagious disease or virus is directly involved. See *Blue* v. *Beach*, 155 Ind. 121, 56 N. E. 89, and the Annotations thereto, at 80 Am. St. Rep. 212; 25 Am. Jur., "Health," Secs. 21 and 25, inclusive; 56 Am. Jur., "Water Works," Sec. 76. Where such necessity is established, the Courts, especially in recent years, have adopted a liberal view of the health measures promulgated and sought to be enforced. See McQuillan, Municipal Corporations (3rd Ed.), Vol. 7, Sec. 24.224. As said in 11 Am. Jur., "Constitutional Law," Sec. 271, at page 1023:

"The protection of the public health and safety is the basis of much valid regulation over persons. This broad field includes not only legislation relating to the prevention and curtailment of disease through quarantine, when not in conflict with Federal regulations on the subject, vaccination, and segregation in special hospitals of persons suffering from contagious and infectious illnesses, but also measures relating to eugenics and the maintenance of a healthy, normal, and socially sound populace."

As knowledge in both the medical and dental fields has increased, the subject of health in both of these spheres has become more important, and modern experience shows that private convenience and individual freedom of action are required to yield to the public good in instances where formerly there was observed no necessity for legislative interference. See *Territory* v. *Hop Kee*, 21 Haw. 206, Ann. Cas. 1915D, 1082, and other authorities cited in notes to 37 Am. Jur., "Municipal Corporations," Secs. 286 and 288. No principle is better established in our system of jurisprudence than the one that "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations * * * imposed in the interests of the community." *Chicago, B. & O. R. Co.* v. *McGuire*, 219 U. S. 549, 565, 55 L. ed. 328, 21 S. Ct. 259, as quoted in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330. Plaintiffs concede, as they must, that municipalities may chlorinate their water supply (*Commonwealth* v. *Town of Hudson*, 315 Mass. 335, 52 N. E. (2d) 566; McQuillin, Municipal Corporations (3rd Ed.), Vol. 7, Sec. 24.265) and though they contend, under one proposition, that a city's treatment of its water supply with fluorides is the unlicensed practice of medicine, dentistry and pharmacy under our statutes, they here argue that such treatment must be distinguished from treatment with chlorides, because the latter will kill germs, purify water and accordingly aid in the prevention and spread of disease, whereas

fluorides will not. We think that if the putting of chlorides in public water supplies will in fact promote the public health, the distinction sought to be drawn by plaintiffs is immaterial. To us it seems ridiculous and of no consequence in considering the public health phase of the case that the substance to be added to the water may be classed as a mineral rather than a drug, antiseptic or germ killer; just as it is of little, if any, consequence whether fluoridation accomplishes its beneficial result to the public health by killing germs in the water, or by hardening the teeth or building up immunity in them to the bacteria that causes caries or tooth decay. If the latter, there can be no distinction on principle between it and compulsory vaccination or inoculation, which, for many years, has been well-established as a valid exercise of police power. See *Blue* v. *Beach* and other authorities cited, *supra,* as well as the Annotations at 93 A. L. R. 1434. See also *De Aryan* v. *Butler* (Ct. of App. Cal. (260 P. (2d) 98)), in which some of the same arguments made here were made and rejected concerning the fluoridation of the water supply of the City of San Diego, California. While the evidence in the present case did not purport to establish fluoridation as a remedy or prevention for any specific contagious disease, it did show, without contradiction, that it will materially reduce the incidence of caries in youth. The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. Accordingly, we hold that in establishing the fluoridation prescribed by Ordinance 6565, as effective to reduce dental caries, the evidence also sufficiently established it as a health measure to be a proper subject for exercise of the police power possessed by the City of Tulsa.

We now come to plaintiffs' argument that fluoridation of Tulsa's water supply cannot be justified as a *public* health measure because the evidence went no further than establishing it as an aid to the prevention of caries in persons under sixteen years of age, and tended to show that

consumption of such water is of no benefit to older persons. The evidence did not reveal what proportion of Tulsa's population is under sixteen years of age, but under our view this was not necessary. When it is borne in mind that the children and youth of today are the adult citizens of tomorrow, and that this one segment of the population unquestionably benefited by the drinking of fluoridated water now, will in a few years comprise all or a very large percentage of Tulsa's population; and it is further realized that reducing the incidence of dental caries in children will also benefit their parents, the fallacy of plaintiffs' argument is manifest.

We think the uncontradicted testimony of Dr. Paul Haney, Superintendent of Health for the City and County of Tulsa, who was the only witness used at the trial, is sufficient answer to plaintiffs' claim that on the basis of the evidence, the same benefits to be obtained from fluoridation of said City's water supply could be obtained by leaving individuals to fluoridate their own water on a voluntary basis. Dr. Haney's testimony shows not only that the treatment of drinking water by individuals not directly under the supervision of health authorities or as prescribed by a private physician (whose services many families would be financially unable to employ) may be dangerous, but also that it is necessary that all or nearly all of the water consumed by children in the age group involved be fluoridated over a period of years in order for them to obtain the benefits of such process. He explained that such total consumption would not be likely to occur in children of school age, if the fluoridation was left to be done individually or in their homes, because they are at school or away from home much of the time.

Plaintiffs do not elaborate on their contention that Ordinance 6565 is in violation of the "free exercise" of religion, which, in the First Amendment of the United States Constitution, Congress is forbidden to prohibit, but we assume this is based on the hypothesis that the fluoridation prescribed in the Ordinance is a form of "medication" or

"medical treatment" forbidden by the tenets of one or more well-known churches or religious sects. This argument is closely allied to one phase of the plaintiffs' "Proposition 4" to the effect that fluoridation is treatment of a disease and therefore that the Ordinance constitutes the unlicensed practice of medicine as defined and forbidden in Title 59, O. S. 1951, Sec. 495b, and 497. To what was said concerning a similar argument in *De Aryan* v. *Butler, supra,* which we hereby approve and adopt, we wish to add our opinion that in the contemplated water fluoridation, the City of Tulsa is no more practicing medicine or dentistry or manufacturing, preparing, compounding or selling a drug, than a mother would be who furnishes her children a well-balanced diet, including foods containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra. No one would contend that this is practicing medicine or administering drugs. This conclusion also disposes of the contention that the Ordinance constitutes a violation of Title 59, O. S. 1951, Secs. 273 and 333, wherein plaintiffs employ what a California Judge is said to have termed an "over-refinement" in the application of definitions to facts.

With reference to plaintiffs' contention that the proposed fluoridation violates Title 63, O. S. 1951, Sec. 196, forbidding, among other things, the manufacture and sale of food to which "fluorine compounds" have been added, defendants say that said Section, which was a part of the Pure Food and Drug Act passed in 1910, was repealed by implication in the Oklahoma Food Act passed in 1949 (Title 63, O. S. 1951, Secs. 180.1-180.19, incl.). No cases are cited on either side of this argument and we think defendants' contention goes too far. However, it must be noted that despite the prohibition against the addition of certain named acids and other substances included with "fluorine compounds" in Sec. 196, *supra,* some of which must certainly be deemed "poisonous or deleterious substances" (as defined by Webster's Dictionary), Sec. 180.13 referring to the addition of such substances to foods, provides that when

it is necessary to use them, this can be done under reasonable rules and regulations promulgated by the Board of Health. It would thus appear that even though the latter section might not accurately be said to entirely repeal the former section by implication, it cannot be doubted that in practical operation and effect it modified it to a certain extent; and we so hold. It therefore follows that since the Board of Health has promulgated rules and regulations prescribing the amount of, and manner in which, fluorides can be added to a city water supply, and the ordinance in question plainly provides that such rules and regulations be complied with, we do not think the fluoridation involved herein can correctly be considered a violation of Sec. 196, *supra*, when construed in the light of, and as its application is modified or limited by, Sec. 180.13, *supra*.

Since the filing of the original briefs in the present case, an Ohio Court has reached similar conclusions on the same questions involved herein and similar ones in the case of *Kraus* v. *City of Cleveland*, (Ct. of Com. Pleas) 116 N. E. (2d) 779.

As no ground for reversal has been found in any of the arguments advanced by plaintiffs, the judgment of the trial court is hereby affirmed.

Appendix B.

63 O. S. 1951:

s 27. *Pollution or Obstruction of Water Supply—Punishment.* Whoever wilfully and maliciously deposits excrements, or foul or decaying matter, or in any manner corrupts any spring or reservoir or other source of water used for domestic purposes, or destroys or injures any pipe, conductor of water, or other property pertaining to an aqueduct, or aids or abets in such trespass, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment for not more than thirty days in jail, or by both such fine and imprisonment. R. L. 1910, Sec. 6810.

s 41. *Division of Preventive Dentistry. Creation of Division—Duties—Personnel.* There is hereby created in the State Health Department a division to be known as the "Division of Preventive Dentistry." Through said division the State Health Department shall administer a program of dental care, consultation, research and health education designed to improve the dental health of the people of the State of Oklahoma. The State Health Department is hereby authorized to employ such personnel, working under the supervision of the State Commissioner of Health, as is necessary to carry out the provisions of this Act. Laws 1947, p. 398, s 1.

s 52. *Labeling of Bedding Required.* (a) All bedding shall bear securely attached thereto and plainly visible, a substantial white cloth tag upon which shall be indelibly stamped or printed with black ink, in the English language, a statement showing whether new materials or second-hand materials have been used in filling such bedding, and type or grade of cotton and all other materials used in filling mattress to which attached when new materials are used, what germicidal treatment, if any, has been applied to the materials or to the bedding; the date of such germicidal treatment, the number of the permit of the person manufacturing the bedding; and the number of the permit of the person applying such germicidal treatment, if any.

(b) The terms used on the tag to describe materials shall be restricted to those defined in the regulations of the department, and no trade or substitute terms shall be used.

(c) It shall be unlawful to make any false or misleading statements on the tag required by this Section. It shall be unlawful for any person to remove, deface, alter, or cause to be removed, defaced or altered, any tag or statement contained thereon for the purpose of defeating any of the provisions of this Act. The placing of registration stamps required in Section 7 of this Act over any lettering on the tag, shall be construed to be defacement of the tag.

(d) The size of the tag to be affixed to new bedding required by this Section shall not be less than six (6) square inches, and the lettering thereon, covering the statement of filling materials, shall be in plain type not less than one-eighth (1/8) inch in height.

(e) Every article of bedding manufactured for resale containing second-hand material, shall bear, securely sewn thereto on all four sides of the tag, four (4) by eight (8) inches in size, upon which shall be indelibly stamped or printed in red ink, in the English language, in plain type not less than one-half (1/2) inch in height, stating: "second-hand material." Laws 1945, p. 235, s 2.

s 53. *Used Materials from Dump-Grounds and Hospitals.* No person shall manufacture, repair or renovate into bedding or batting, using discarded materials obtained from dump-grounds, junk yards, or hospitals within or without the State of Oklahoma. Laws 1945, p. 236, s 3.

s 54. *Germicidal Treatment of Materials.* All second-hand materials or portions thereof, for resale, shall be subjected to a germicidal treatment that will render said second-hand material safe for human use. Laws 1945, p. 236, s 4.

s 55. *Enforcement of Act.* The State Board of Health is hereby charged with the enforcement of this Act, for the protection of health and to prevent the spread of disease; to make rules and regulations providing for examination of bedding offered for sale; to embargo bedding suspected of being improperly labeled; to regulate disposal of bedding determined to be unsafe for human use, and to prescribe means, methods, and practices to make effective such provision. Laws 1945, p. 236, s 5.

s 71. *Ophthalmia Neonatorum—Definition.* That any inflammation, swelling or unusual redness in either one or both eyes of any infant, together with any unnatural discharge from the eye or eyes of such infant, independent of the nature of the infection, if any, occurring at any time

within four weeks after the birth of such infant, shall be known as "Inflammation of the eyes of the new-born" (ophthalmia neonatorum). Laws 1921, ch. 4, p. 4, s 1.

s 72. *Physicians, etc.—Duty to Report—Treatment.* It shall be the duty of any physician, surgeon, obstetrician, midwife, manager or person in charge of a maternity home or hospital or other public or private institution in the State of Oklahoma, parent, relative and persons attendant on or assisting in any way whatsoever any infant, or the mother of any infant at childbirth or any time within twenty-four hours after childbirth, knowing the conditions hereinabove defined to exist, to report within six hours and confirm such fact in writing within three days, to the local health officer of the county, city, town, magisterial district or whatever other political division there may be within which the infant or the mother of any infant may reside.

In the event of there being no health officers in the county, city, or town, in which the infant resides, midwives and other persons as hereinabove defined, excepting physicians, surgeons and obstetricians, shall immediately report such conditions to some qualified practitioner of medicine. On receipt of such report the health officer, or the physician notified, where no health officer exists, shall immediately give to the parents or persons having charge of such infant, a warning of the dangers to the eye or eyes, of such infant, and shall for indigent cases provide the necessary treatment at the expense of said county, city or town. Laws 1921, ch. 4, p. 5, s 2.

s 73. *Treatment—Duty to Administer Antiseptic.* It shall be unlawful for any physician or midwife, osteopaths and chiropractics practicing midwifery to neglect, or otherwise fail to instill immediately upon its birth, in both eyes of the new-born child a one per cent solution of nitrate of silver or other proven antiseptic, which shall be furnished by the State Board of Health in individual ampules containing the proper solution and quantity for one treatment in both eyes. Should a physician or the parents of said

child prefer to use a form of prophylaxis other than the one prescribed by above, he may do so provided that he states in writing his reasons for doing so to the local health officer of the county, city, town, magisterial district or whatever political division there may be within which the infant or the mother of any infant may reside, within three days from the date of administering same. Should a physician or the parents of said child deem it best for the interest of his patient, not to use any prophylactic, he shall not be required to do so provided that he states fully in writing, to the local health officer of the county, city, town, magisterial district or whatever other political division there may be within which the infant or the mother of any infant may reside, within three days from the birth of said child, his reasons for not doing so. Laws 1921, ch. 4, p. 5, s 3.

s 74. *Report of Use of Nitrate of Silver.* Every physician or midwife shall, in making a report of a birth, state whether or not the above solution was instilled into the eyes of said infant. Laws 1921, ch. 4, p. 5, s 4.

s 75. *Health Officer—Duties.* It shall be the duty of the local health officer:

1. To investigate, or have investigated, each case of reported ophthalmia neonatorum as shall have been filed with him in pursuance of the law, and such other cases as may be brought to his attention.

2. To report to the State Board of Health all cases of inflammation of the eyes of the new-born and the result of all such investigations in such form as the State Board of Health may prescribe and direct.

3. To conform to such other rules and regulations as the State Board of Health shall designate and promulgate for its further guidance. Laws 1921, ch. 4, p. 5, s 5.

s 76. *State Board of Health—Duties.* It shall be the duty of the State Board of Health:

1. To enforce the provisions of this Act.

2. To promulgate such rules and regulations as shall,

under this Act, be necessary to secure the purposes of this Act, and which the Board may deem necessary for the further and proper guidance of local health officers.

3. To provide for the gratuitous distribution of silver nitrate outfits, in individual ampules, containing a one per cent solution with proper directions for the use and administration thereof, to all physicians and midwives as may be engaged in the practice of obstetrics, or assisting at childbirth. Such directions may also be printed in foreign languages in the discretion of the State Board of Health.

4. To publish and promulgate such further advice and information concerning the dangers of inflammation of the eyes of the new-born as is necessary for the prompt and effective treatment.

5. To furnish copies of this law to all physicians and midwives as may be engaged in the practice of obstetrics, or assisting at childbirth.

6. To report any and all violations of this Act as may come to their attention to the prosecuting attorney of the county wherein a misdemeanor as defined in Section 7 of this Act shall have been committed, and to assist said official in any way possible, by securing necessary evidence, and otherwise.

7. To furnish birth certificates which shall include the question "Did you instill in each eye of the infant a one per cent solution of nitrate of silver, immediately after birth?" and to require a written answer to this question. Laws 1921, ch. 4, p. 6, s 6.

s 77. *Violation of Act—Punishment.* Whoever, being a physician, surgeon, obstetrician, midwife, manager or person in charge of a maternity home or hospital, or public or private institution in the State of Oklahoma, violates any of the provisions of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined a sum of not less than $50.00 nor more than $1,000.00 for the

first offense, and not less than $100.00 nor more than $2,000.00 for subsequent offenses. Laws 1921, ch. 4, p. 6, s 7.

s 78. *Religious Beliefs—Persons Having When Excepted.* Nothing in this Act shall be construed to compel persons or parents to conform to same, who have religious beliefs contrary to the use of medicines. Laws 1921, ch. 4, p. 6, s 8.

s 151. *Bakeries and Other Food-Stuff Factories—Sanitary Regulations.* Every room or building occupied as a bakery or confectionery, canning, packing, pickling or preserving establishment, or for the manufacture of any food product, shall be drained and plumbed in a manner conductive to its healthful and sanitary condition, and constructed with air-shafts and windows or ventilating pipes sufficient to insure ventilation, as the factory inspector shall direct. No cellar or basement shall hereafter be used as a bakery, and no cellar occupied by a bakery on or before the passage of this Act, when once closed, shall be again opened for such use. Every bakery shall be provided with a washroom and a water closet apart from the bake room and rooms where the manufacturing of such food products is conducted; no water closet, earth closet, or privy shall be within, or communicate directly with, a bake shop. Rooms used for the manufacture of flour or meal food shall be at least eight feet in height. The side walls of such room shall be plastered or wainscoted, the ceiling plastered or ceiled with lumber or metal, and, if required by the factory inspector, shall be whitewashed at least once in three months; the furniture, utensils and floor of such room shall be kept in a healthful sanitary condition. The manufactured flour or meal products shall be kept in dry, clean and airy rooms. The sleeping places for persons employed in a bakery shall be separate from the rooms where food products are manufactured or stored. Laws 1910-11, ch. 125, p. 276, s 1.

s 152. *Employment of Diseased Persons — Personal Cleanliness — Conveniences for Employees.* No employer

shall permit any person to work in his bake shop or other institution in which food stuffs are manufactured who is affected with pulmonary tuberculosis, scrofulous or venereal diseases, or with a communicable skin affection, and every employer shall maintain himself and his employees in a clean and sanitary condition while engaged in the manufacture, handling or sale of such food products. Every owner, agent or lessee of any establishment where food products are manufactured shall provide cuspidors or vessels to be used for expectoration purposes by employees; chairs shall also be furnished, and employees are hereby prohibited from sitting on any dough boards or tables used for the purpose of manufacturing, in any way whatever, any food products. Laws 1910-11, ch. 125, p. 277, s 2.

s 295.2. *Sale or Possession of Adulterated or Misbranded Milk or Milk Products.* No person shall within the State of Oklahoma produce, sell, offer or expose for sale, or have in possession with intent to sell any milk or milk product which is adulterated or misbranded. It shall be unlawful for any person elsewhere than in a private home to have in his possession any adulterated or misbranded milk or milk product. Laws 1949, p. 11, s 2.

s 295.3. *Labeling or Marking Containers.* All bottles, cans, packages, and other containers enclosing milk or any milk product defined in this Act, except bottles, cans, packages, and other containers enclosing such milk or any milk product for delivery to a pasteurization plant, shall be plainly labeled or marked with (1) the name of the contents as given in the definitions of this Act; (2) the grade of the contents, if the contents are graded; and (3) the word "pasteurized" only if the contents are pasteurized; (4) the word "raw" only if the contents are raw; and (5) the name and address of the processor, producer, or distributor. No milk or milk product shall be labeled and sold or offered for sale bearing the grade designations A or B unless the milk has been produced, processed, and distributed in compliance with the provisions of this Act and the use of the grade

labels as approved by the State Commissioner of Health. Laws 1949, p. 12, s 3.

s 295.4. *Access to Establishments—Statements of Quantities—Sealing Containers—Records.* (a) Every milk producer and distributor shall, upon request of the State Commissioner of Health, or his authorized representative, permit him access to all parts of the establishment, and every distributor shall furnish the State Commissioner of Health, or his authorized representative, upon his request, for official use only, a true statement of the actual quantities and weight of milk, either bottled, processed, or manufactured into butter, cheese, and other milk products, of each grade purchased and sold, together with a list of all sources, records of inspections and tests, and recording thermometer charts.

(b) Repealed. Laws 1951, p. 3, s 1.

(c) Any person or distributor or processor receiving fluid milk shall keep an accurate record of all such milk received, showing the weight, grade, test, and source of origin thereof, and make a complete report of all receipts of fluid milk to the State Commissioner of Health and the State Board of Agriculture at the end of each calendar month. Law 1949, p. 12, s 4.

s 295.5. *Bacteriological and Laboratory Tests.* All bacteriological and other laboratory tests and all chemical and physical determinations shall be made in accordance with the methods prescribed by the rules and regulations promulgated by the State Board of Health. The latest standard methods of the American Public Health Association shall be the basis of the methods prescribed under this section. Laws 1949, p. 12, s 5.

s 296.2. *Vitamin and Mineral Requirements for Flour —Sales to Distributors, Bakers or Processors.* It shall be unlawful for any person to manufacture, mix, compound, sell or offer for sale, for human consumption in this State, flour (as defined in Section 1) unless the following vitamins

and minerals are contained in each pound of such flour; not less than 2.0 milligram and not more than 2.5 milligram of thiamine; not less than 1.2 milligram and not more than 1.5 milligram of riboflavin; not less than 16.0 milligram and not more than 20.0 milligram of niacin or niacin-amide; not less than 12.0 milligram and not more than 16.5 milligram of iron (Fe); except in the case of self-rising flour which in addition to the above ingredients shall contain not less than 500 milligram and not more than 1500 milligram of calcium (Ca); Provided, however, that the terms of this section shall not apply to flour sold to distributors, bakers or other processors, if the purchaser furnishes to the seller a certificate in such form as the Commissioner shall by regulation prescribe, certifying that such flour will be (1) resold to a distributor, baker or other processor, or (2) used in the manufacture, mixing or compounding of flour, white bread or rolls enriched to meet the requirements of this Act, or (3) used in the manufacture of products other than flour. white bread or rolls. It shall be unlawful for any such purchaser so furnishing any such certificate to use or resell the flour so purchased in any manner other than as prescribed in this section. Laws 1947, p. 398, s 2.

s 296.3. *Vitamin and Mineral Requirements for Bread and Rolls.* It shall be unlawful for any person to manufacture, bake, sell, or offer for sale, for human consumption in this State, any white bread or rolls (as defined in Section 1) unless the following vitamins and minerals are contained in each pound of such bread or rolls; not less than 1.1 milligram and not more than 1.8 milligram of thiamine; not less than 0.7 milligram and not more than 1.6 milligram of riboflavin; not less than 10.0 milligram and nor more than 15.0 milligram of niacin or niacin-amide; not less than 8.0 milligram and not more than 12.5 milligram of iron (Fe). Laws 1947, p. 399, s 3.

s 331. *Definition of Hotel; Right to Use Name—Issuance of License.* Every building or other structure, kept, used, maintained, advertised or held out to the public to be

a place where food is served and sleeping accommodations are offered for pay to transient guests, in which eight or more rooms are used for the accommodation for such transient guests and having one or more dining rooms or cafes, where meals or lunches are served to such transient guests, such sleeping accommodations and dining rooms being conducted in the same building and under the same management, together with any buildings in connection therewith, shall, for the purposes of this act, be deemed a hotel, such only shall have the right to the use of the name "hotel" in connection with their business, and upon the proper application the State Board of Health shall issue to such above described business a license to conduct a hotel. Laws 1915, ch. 227, s 1.

s 332. *Rooming House Defined—Sleeping Accommodations for Automobile Transients—License.* Every building or other structure kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are furnished for pay for transient or permanent guests in which eight or more rooms are used for the accommodation of such guests, but which does not maintain dining rooms or cafes in the same building, and under the same management together with any buildings in connection therewith, shall, for the purpose of this Act, be deemed a rooming house and shall not have the right to the use of the name "hotel" in connection with such business; and every house, cabin or structure that is designed, used or intended for rent or hire to automobile transients for sleeping accommodations, irrespective of the number of rooms therein, shall also be deemed a rooming house for the purpose of this Act. Upon proper application, the State Commissioner of Health shall issue to such described business a license to conduct a rooming house; provided, that nothing in this Act shall be construed to prevent the use of any name the proprietor of such rooming house may desire to apply to his business, which name does not include the word "hotel." Laws 1915, ch. 227, s 2; Laws 1949, p. 430, s 1.

s 333. *Apartment House Defined—License.* Every building or other structure kept, used, maintained, advertised or held out to the public to be a place where accommodations for sleeping rooms, either single or in suites for light housekeeping, or both, but where no dining room or cafe is maintained in the same building or under the same management, and where two or more families or tenants aggregating 15 persons or more occupy said building, together with any buildings in connection therewith, shall for the purposes of this act, be deemed to be an apartment house and shall not have the right to use the word "hotel" or "rooming house" in such business. Upon proper applications, the State Board of Health shall issue to the above described business a license to conduct an apartment house; provided, that nothing in this act shall be construed to prevent the use of any name the proprietor of a licensed apartment house may desire to apply to his business, which name does not include the words "hotel" or "rooming house." Laws 1915, ch. 227, s 3.

s 334. *Restaurant Defined—License.* Every building or other structure kept, used, maintained, advertised, or held out to the public to be a place where meals or lunches are served without sleeping accommodations together with all outbuildings in connection therewith, shall for the purpose of this act be defined, a restaurant, and, upon proper application to the State Board of Health, shall issue to such above described business a license to conduct a restaurant; provided, that nothing in this act shall be construed to prevent the use of any name a proprietor of a licensed restaurant may desire to apply to his business, which name does not include the word "hotel," "rooming house" or "apartment house." Laws 1915, ch. 227, s 4.

Appendix C.

Tit. 63, O. S. 1951:

s 3. *Powers and Duties of Commissioner.* The State Commissioner of Health shall have power to make and enforce any and all needful rules and regulations for the prevention and cure, and to prevent the spread of any contagious, infectious, or malarial diseases among persons; to establish quarantine and isolate any persons affected with contagious and infectious diseases; to remove or cause to be removed any dead, decaying or putrid body, or any decayed, putrid, or other substance that may endanger the health of persons or domestic animals; to condemn or cause to be destroyed any impure or diseased article of food that may be offered for sale; to superintend the several boards of health in the counties, cities, villages, towns, and townships; to establish rules and regulations for the keeping and reporting of all vital statistics, births, deaths, marriages, and divorces as provided by this article. R. L. 1910, s 6787.

s 4. *Duties of Board.* It shall be the duty of the State Board of Health, under the provisions of this Article, to quarantine against outside territory known to be infected with contagious or infectious diseases, to take charge of districts or localities in the State infected with any contagious disease and enforce such rules and prescribe such measures as it may deem necessary to prevent the spread of the same or to suppress it; to take proceedings to have abated a nuisance, calculated to affect injuriously the health of the public or any community; to take cognizance of the interest of health and life among the citizens of the State, make sanitary investigations and inquiries relative to the cause of disease, and especially of epidemics, the source of mortality and the effects of localities, employments, conditions and circumstances on the public health, to investigate the sanitary conditions of schools, prisons, public institutions, mines, railroads and street cars and all buildings and places of public resort, and to recommend, prescribe and

enforce such measures of sanitation for them as may be deemed advisable; to advise the State and all local governments in all hygienic matters; to act in conjunction with city, town and township boards of health; and to make a report in writing to the Governor twenty days preceding each regular and special session of the Legislature, upon the sanitary condition, prospect and needs of the State, setting forth the action of the Board, all its expenditures since the last preceding report, and such other matters as it may deem proper for the promotion of health or the prevention of disease; which said report shall be laid before the Legislature by the Governor at its ensuing term. R. L. 1910, s 6788.

s. 541. *Definition of Terms.* For the purposes of this Act the words "venereal disease" shall include any and all diseases commonly communicable from any person to any other person of the opposite sex through or by means of sexual intercourse and found and declared by medical science or accredited schools of medicine to be infectious, or contagious. All words or phrases using the male or female gender, in this Act, shall be construed to mean and cover the gender of the opposite sex. "Infected person," as used in this act, shall mean and apply to any person, of either sex, who may be contaminated or afflicted with any venereal disease. The word "dealer," as used in this act, shall mean and cover any person, firm or corporation who or which may handle, for sale, any medicinal remedies or supposed remedies for venereal diseases, and the agents, clerks and employees of any such person, firm or corporation; and any person, firm or corporation who or which may profess or claim to treat or cure, by the use of medicine or otherwise, any such venereal disease, and their agents, clerks and employees. The word "physician," as used in this act, shall include reputable physicians who have complied with all the requirements of law regulating the practice of their respective schools of medicine, and duly licensed by such law to practice medicine in their respective schools, or surgery,

or both, and no other person. The word "keeper" as used in this act, shall mean and cover any person or persons in charge or control of any penal or eleemosynary institution whether public or private who may be authorized either by law or by the rules of such institution to receive or discharge any person into or from such institution. Wherever the words "Board of Health" or "Health Officers" appear in this act they should be construed to include the Board of Health and Health Officers of the State, County or Municipality of the State. Laws 1919, ch. 17, p. 31, s 1.

s 552.2. *Rules and Regulations.* The State Commissioner of Health shall have power to make and amend any and all rules and regulations for the prevention and cure, to prevent the spread of the venereal diseases, which he deems necessary for carrying out of this and all other legislation for the control of venereal diseases, and such rules and regulations shall have the force and effect of law. Laws 1945, p. 243, s 2.

No. 420

In the Supreme Court of the United States

October Term, 1924.

Kevin L. Dowell, D. F. Gunderson, Mrs. Thomas Gunderson, C. R. Roberts, Bessie Roberts, E. M. Lee, [illegible] V. Allen, Mrs. J. W. Elsey, Earl Leroy, Benjamin H. Kelly,

Petitioners,

vs.

The City of Tulsa, a municipal corporation, C. M. Warren, mayor, Sherry McConnell, J. L. Jones, and W. W. Jenkins, commissioners thereof,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Sherrard Lemmon,
Tulsa, Oklahoma,

Solicitor for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1954.

No. 420

Martin L. Dowell, D. F. Gerstenberger, Mable Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy, Marguerite M. Miller, ***Petitioners,***

vs.

The City of Tulsa, a municipal corporation, C. M. Warren, mayor, Glenver McConnell, J. L. Jones and W. W. Jenkins, commissioners thereof, ***Respondents.***

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

The Petition for Writ of Certiorari states (pages 2 and 3) four questions presented for review. These relate to Ordinance No. 6565, enacted by the Board of Commissioners of the City of Tulsa, authorizing the fluoridation of that City's water supply by its Water Department and Commissioner of Waterworks and Sewerage. See opinion of Oklahoma Supreme Court, page 12 of Petition for Writ of Certiorari. In the first of three questions stated by Petitioner, the City of Tulsa is designated a subordinate agency or a political agency of the State of Oklahoma.

It is the position of Respondents, *first*, that Ordinance No. 6565 of the City of Tulsa was enacted under the police

power delegated to it by the State of Oklahoma and that this power is as broad as the police power of the State itself. *Second*, that Ordinance No. 6565 meets all the constitutional standards set by this Court and that this ordinance does not violate either the First or Fourteenth Amendments of the United States Constitution. We designate these propositions as Propositions 1 and 2.

Proposition 1.

The authority contained in the Oklahoma Constitution for the adoption of a city charter is to be found in Article XVIII, Section 3 (a). The pertinent parts are as follows:

> "Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State * * * Upon such approval it shall become the organic law of such city * * *."

Under such a constitutional provision, the Supreme Court of the United States in *District of Columbia* v. *Thompson Co.*, (U. S.) 97 L. ed. (Advance Sheets, p. 888, at pages 893 and 894), held that the delegated power of municipalities is as broad as the police power of the state. (See note 6 at p. 894, citing above section of Oklahoma Constitution.)

Oklahoma Statutes 1951, Title 11, Section 564, is as follows:

> "When a charter for any city of this state shall have been framed, adopted and approved according to the provisions of this article, and any provisions of such charter shall be in conflict with any law or laws relating to cities in force at the time of the adoption and approval of such charter, the provisions of such charter shall prevail and be in full force, notwithstanding such conflict, and shall operate as a repeal or suspension of such state law or laws to the extent of such

conflict; and such state law or laws shall not thereafter be operative in so far as they are in conflict with such charter: *Provided,* that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict with the provisions of the Constitution and laws relating to the exercise of the initiative and referendum, and other general laws of the state not relative to cities of the first class. R. L. 1910, Sec. 539."

Article 2, Section 1, paragraph 2 of the Charter of the City of Tulsa is as follows:

"*The City of Tulsa shall have power to enact and to enforce ordinances necessary to protect health, life and property* and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; *provided* that no ordinance shall be enacted inconsistent either with the Constitution or law of the State of Oklahoma, or inconsistent with the provisions of this charter; and *provided further,* that the specifications of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted, it being intended by this charter to grant to and bestow upon the inhabitants of the City of Tulsa full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter, or by some general law of the State of Oklahoma, or by the provisions of the Constitution of the State of Oklahoma."

In addition to the authority vested in the City of Tulsa by its charter, we cite certain Oklahoma Statutes as follows:

Oklahoma Statutes 1951, Title 11, Section 642, reads in part:

"The mayor and council shall * * * have the power

to enact * * * ordinances not repugnant to the laws of the United States and the Constitution and laws of this state, as they shall deem expedient and for * * * the benefit of * * * the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect * * *."

Oklahoma Statutes 1951, Title 11, Section 665, reads in part:

"The council may * * * make regulations to secure the general health of the city * * *."

Oklahoma Statutes 1951, Title 11, Section 672, reads in part:

"For any purpose, mentioned in the preceding sections, the council shall have the power to enact and make all necessary ordinances, rules and regulations, and they shall, also, have power to enact and make all such ordinances, by-laws, rules and regulations, not inconsistent with the laws of the State as may be expedient for maintaining the peace, good government, and welfare of the city * * *."

Cases Cited by Petitioners Distinguished:

The Oklahoma cases cited by Petitioner (Petition, p. 7) with the exception of *City of McAlester* v. *Grand Union Tea Company,* are cases in which the question involved was whether legislative power could be delegated to administrative boards. They are not in point because the question here is whether the ordinance which the City of Tulsa enacted in its legislative capacity is valid.

All that was decided in *City of McAlester* v. *Grand Union Tea Co.* was that an ordinance making the going in or upon private residences for the purpose of soliciting orders for sale of goods without consent of the owner or occupant was invalid because it attempted to declare a pri-

e nuisance a public nuisance and that the solicitation of itimate mercantile business or trade could not be resolved o a health, safety or general welfare regulation by sup- ssion through the medium of a town ordinance. Here the linance involved is obviously a health measure.

Turning now to the decisions of this Court cited by itioners, *Panama Refining Co.* v. *Archie D. Ryan, et al.* etition for Writ of Certiorari, p. 8), involved an unlaw- delegation of legislative power to the President. All that s decided in *D. C. Weaver, et al.*, v. *Palmer Bros. Co.* etition, p. 8) was that the prohibition of all use of shod- new or old, even when sterilized in the manufacture of nfortables for beds is unreasonable and arbitrary and de- ves manufacturers of due process. The evidence showed t the use of shoddy in the manufacture of comfortables en sterilized was not injurious to health.

In the case at bar, none of the parties contended that linance No. 6565 was not a health measure. Petitioners tended that the Oklahoma Legislature never established olicy of attempting to regulate or control any disease ept those that are "contagious, infectious or dangerous" s admitting that Ordinance No. 6565 is a health measure contending that dental caries, for the control of which ridation of public water supplies was provided, was not ontagious, infectious or dangerous disease. The Okla- na Supreme Court rejected these contentions and held t the Oklahoma Legislature had not restricted its health asures to those designed to prevent the spread of in- tious, contagious or dangerous diseases. (Petition, pp. and 14.)

Lawson v. *Steele* simply holds that the police power of tate extends to everything essential to the public safety,

health and morals and justifies the destruction or abatement by summary proceedings of nets being used for fishing in a manner detrimental to the interests of the public. It has no bearing on the proposition in support of which it is cited.

Liggett Co. v. *Baldridge* holding that a state cannot require all owners of stock in a corporation operating a pharmacy to be registered pharmacists, where by other laws it has fully safeguarded the buying, compounding or selling of drugs and medicine is not relevant to the issues in this case. The same is true of *Mugler* v. *Kansas* holding that a state has the power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquor shall be deemed a common nuisance and be abated and at the same time to provide for the indictment and trial of the offender.

Pierce v. *Society of Sisters, etc., and Hill Military Academy* holding that requiring all children between the ages of 8 and 16 years to attend the public schools unconstitutionally interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control, and *Robert T. Myer* v. *State of Nebraska* holding that prohibiting the teaching in schools of any other than the English language until the pupil has passed the eighth grade, violates the guarantee of liberty in the Fourteenth Amendment to the Federal Constitution in the absence of sudden emergency rendering the knowledge of foreign law clearly harmful, have no bearing on the paramount issue involved here, which is whether the City of Tulsa, under the legislative power delegated to it by the State of Oklahoma, can enact an ordinance as a health measure, requiring the use of fluorine in water to protect the teeth of children and the public generally from dental caries.

Proposition 2.

As I understand Petitioners' contention, it is that the First Amendment to the United States Constitution providing that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, made applicable to the states by the Fourteenth Amendment to the United States Constitution, renders invalid Ordinance No. 6565 enacted by the City of Tulsa. This argument is based on a confusion of the meaning of religious freedom as was stated by the Court in *C. Leon De Aryan* v. *John D. Butler, as Mayor of the City of San Diego, California, et al.*, No. 169974 in the Superior Court of the State of California in and for the County of San Diego (not officially reported):

> "The next question is whether or not the program if adopted will violate the fundamental right to freedom of religion as guaranteed by the United States Constitution and the Constitution of this State, of those citizens of the City whose religious beliefs are opposed to taking medicines.
>
> "Religious freedom embraces two concepts; freedom of *belief* and freedom to *act*. The first is absolute, but in the nature of things the second cannot be, in that all acts or conduct of our citizens must conform to all reasonable regulations adopted by the respective governmental agencies acting within the scope of their authority. (*Rescue Army* v. *Municipal Court*, 28 Cal. (2d) 460, 470.)
>
> "In this connection our State Supreme Court has said:
>
> > 'There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective.'

(*Rescue Army* v. *Municipal Court, supra* (citing U. S. Supreme Court cases). To the same effect *Hamilton* v. *Regents,* 293 U. S. 245 (Calif.); *Gabrielli* v. *Knickerbocker,* 12 Cal. (2d) 85).

"Therefore, no constitutional rights of any of the citizens of San Diego to freedom of religious belief would be invaded or violated by the adoption of the proposed program."

In *Ian Ross McFarlane, et al.,* v. *Mayor and City Council of Baltimore City, et al.,* Circuit Court of Baltimore City, (not officially reported) the Court said:

"The objection is also made by Harry C. Hoffman, one of the complainants, that the introduction of fluorine into the water supply would be an infringement of his constitutional rights, he being a Christian Scientist, alleging that the introduction of fluorine into the water supply of Baltimore City will compel him to violate one of the basic principles of his religion. A letter was introduced in evidence from the Committee on Publication of the Christian Science Publications for Maryland in which it is stated that:

'Adherents of Christian Science regard medication and medical examination of all sorts as methods of indoctrination which operate to teach them to look to the physical body for health, whereas Christian Science teaches that health comes from God and true prayer makes that fact evident.'

"The argument is made that to require him to use City Water after it has been ingested with fluoride, which it is claimed is a drug, would require him to submit to something which is against the tenets of his religion. However, the question as to whether this is medication is a debatable one, because in the opinion of Doctor Pincoffs he would not consider this as being medication, so that irrespective of the merits of the contention of Mr. Hoffman on broad constitutional lines,

as a question of fact it is debatable as to whether or not the use by him of this water after fluoride has been put into it would be a violation by him of the tenets of his religion. It has been shown in the evidence that in other large cities the water has been treated exactly the same as it is proposed by the Water Engineer and the Commissioner of Health to treat the water in the City of Baltimore."

The last quoted paragraph answers the contention made by the Petitioners about medication. It will be noted that Dr. Haney's testimony in this case coincides with that of the doctor who testified in the *Baltimore* case.

I quote from the January 1953 issue of "Western City," a municipal magazine, the following reference to a decision of Superior Judge JOHN E. MURRAY of Lewis County, in the State of Washington, dismissing an action to restrain the City of Chehalis from adding fluoride to the water supply:

"The decision categorically rejected the main points contained in the action, which claimed: (1) that fluoridation is compulsory medication; (2) that it violates the Due Process of Law clause of the 14th Amendment of the Federal Constitution and Article 1, Section 3 of the State Constitution; (3) that it constitutes the unlicensed practice of medicine, dentistry, and pharmacy; and (4) that it was an unlawful expenditure of city funds and an unlawful use of the police power.

"Judge Murray found that fluoridation, as a measure specifically to prevent disease (dental decay), was clearly within the scope of the city's power. The city council, he said, was 'justified in concluding that the addition of a limited amount of fluorine to the water would constitute a public health measure and would benefit the people in the community'."

The above decisions are the first to be decided by the

trial courts on the particular question. On the religious question, they call attention to the fact that a person has a right to believe in any particular religion or faith that he cares to, but he does not have the absolute freedom to act in accordance with the tenets of any of those religions, but in his action he is bound to follow the laws duly enacted for the preservation of the health of citizens generally. He cannot object on religious grounds to such laws enacted either by national, state or city authorities. The courts found that the constitutional rights of the plaintiff to freedom of religious belief would not be invaded or violated by the adoption of the proposed program.

Thus, one may conceive it to be his religious duty to practice polygamy but the state may punish the practice as a crime. *Reynolds* v. *United States,* 98 U. S. 145, 25 L. ed. 244. Some persons regard vaccination as something forbidden by the tenets of their faith, but the state or municipality may, consistently with the Constitution, compel vaccination in order to combat smallpox. *Jacobson* v. *Mass.,* 197 U. S. 11, 25 S. Ct. 302, 49 L. ed. 643 (1905). The following extract from Justice EASTWOOD's opinion in *Sadlock* v. *Board of Education,* 137 N. J. Law 85, 58 Atl. (2d) 218, is of particular interest:

> "'At the outset we wish to observe that the question of the desirability or efficacy of compulsory vaccination * * *, and whether it is wise or unwise is strictly a legislative and not a judicial question. It is not the province of this court to pronounce that vaccination is or is not a suitable and satisfactory means of combatting disease. Judicial notice however will be taken that vaccination is commonly believed to be a safe and valuable means of preventing spread of certain diseases, particularly smallpox, and that this belief is supported by high medical opinion. * * *

> "'So, too, with respect to the guaranty of religious freedom, the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare'."

Ordinances providing that no child shall be permitted to attend a public school without first presenting a certificate of vaccination have likewise been upheld. *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. ed. 194 (1922). If the state has decided that the incidence of dental caries is serious enough to warrant action on its part, it is hardly for the courts to enjoin such action on the ground that caries is a less serious disease than smallpox. Dental caries is a recognized disease—according to the United States Public Health Service it is "perhaps the most widespread of all diseases." (See Better Health for 5 to 14 Cents a Year Through Fluoridated Water, Public Health Service Publication No. 62 (1951), page 3; citing National Institute of Municipal Law Officers' Report 140, pages 3 and 44.)

It is contrary to the religion of some persons to send their children to school at all. Yet, the state may compel them to do so. *Commonwealth* v. *Beiler*, 168 Pa. Super. 462, 79 Atl. (2d) 134 (1952); *Rice* v. *Commonwealth*, 188 Va. 224, 49 S. E. (2d) 342 (1948); *State* v. *Bailey*, 157 Ind. 324, 61 N. E. 730 (1901). The Board of Regents of Washington State University required every student, as a condition precedent to registration, to submit to X-ray examination for the purpose of discovering possible tubercular infection. A Christian Scientist was not permitted to register for her senior year because she refused to submit to the examination; to do so would have been contrary to the doctrine of her church and to her personal religious conviction. The Court in *State, ex rel. Holcomb*, v. *Armstrong*, 38 Wash.

(2d) 860, 239 P. (2d) 545 (1952), upheld the Board of Regents.

A very close analogy to fluoridation is to be found in the Compulsory Food Enrichment Laws. At page 39 of Report No. 140, National Institute of Municipal Law Officers, the following statement is quoted from Gunderson, "Improvement in Nutritive Value of Foods," 7 Food Drug Cosmetic Law Journal 128, 133 (1952):

> "'During most of the World War II period, all family white flour and all bakery white breads and rolls were required to be enriched under Federal War Food Order Number 1. That order was terminated in 1946. At the present time enrichment of flour and bread is voluntary in 22 states; it is mandatory by local law in 26 states and three territories. Some of the 26 states with flour and bread enrichment laws also require enrichment of corn meal and grits'."

The Oklahoma Supreme Court in this case held in effect that the ordinance in question has a real and substantial relation to the protection of the public health (Petition for Certiorari, p. 11). It comes within the rule announced by this Court in *Jacobson* v. *Commonwealth of Massachusetts, supra,* cited and followed by the Ohio Supreme Court in *Kraus* v. *City of Cleveland,* 121 N. E. (2d) 311, a case in all respects material here, similar to the instant case. This Court in the *Jacobson* case said:

> "If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature had done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion

of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

We have already pointed out that the ordinance involved does not invade any rights of the Petitioners secured by the United States Constitution. It is scarcely necessary to add authorities in addition to the *Jacobson* case, *supra*. That case and other authorities to the same effect are cited on the last page of *Mark E. Chapman, et al.*, v. *City of Shreveport*, 74 So. (2d) 142, involving the identical questions involved here, which was appealed to this Court as Case No. 407, October term 1954, and dismissed for the want of a substantial Federal question on December 6, 1954.

Conclusion.

In conclusion I believe that I have established that Ordinance No. 6565 of the City of Tulsa was clearly within the police power of that City; that it does not violate either the First or Fourteenth Amendments to the United States Constitution; that no constitutional rights of Petitioners have been invaded and that the Petition for a Writ of Certiorari should be denied for the want of a substantial Federal question.

Respectfully submitted,

EDMUND LASHLEY,
Tulsa, Oklahoma,
Solicitor for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1954.

No. 420

Martin L. Dowell, D. F. Gerstenberger, Mable Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy, Marguerite M. Miller, *Petitioners,*

vs.

The City of Tulsa, a municipal corporation, C. M. Warren, Mayor, Glenver McConnell, J. L. Jones and W. W. Jenkins, commissioners thereof, *Respondents.*

REPLY BRIEF.

Respondents take the position that the ordinance under attack was enacted under a grant of police power to the City of Tulsa, and that "such power is as broad as the police power of the State" (brief, p. 2). To sustain this the quoted part of Art. XVIII, Sec. 3 (a) of the State Constitution, is relied on. The argument ignores the specific limitation that the provisions of the charter the City is authorized to adopt must be consistent with and subject to the constitution and laws of the state. Under the constitution all legislative power is vested solely in the legislature of the state. The police power is the creature of legislative

action so far as its exercise is warranted by an inferior political agency. Only by virtue of express grant thereof by the state may the City of Tulsa assume to exercise such power as is essential to support the action here complained of. While under a grant of power, the city may exercise such incidental authority as may be essential to the proper administration of the particular grant, it may not extend such authority to other fields under the guise of incidental or implied power. It follows all subordinate governmental agencies are without authority to create police powers in themselves. Only where they are attributes of express grants may they be exercised as incidental thereto. As such grants are subject solely within the legislative field and as the power of legislation is one which, under its constitution, the state may not delegate to any other agency, it follows that respondent is powerless to draw unto itself "power as broad as the police power of the State itself." Nor could the legislature confer such power without itself transcending constitutional limitations. The rule is well stated in *Grundling* v. *Chicago*, 176 Ill. 340, 52 N. E. 48, 48 L. R. A. 230, in defining implied power:

> "An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise."

This rule is approved in *State, ex rel. Adams*, v. *Burge, ex rel. School Board of Beloit*, 70 N. W. 347. There is no such thing as implied police power. Where the term "implied" is loosely used it is in the sense of "incidental" to some power expressly granted. The mere fact a municipal corporation is organized as a governmental subdivision does not, because it could not, of itself, either create an independent power nor enlarge one delegated by the legislature

or a particular purpose. In *Welsh Farmers* v. *Bergeman*, N. J.) 84 Atl. (2d) 631, the court, in speaking of a subordinate agency, said:

> "So also it must be realized that the State Department of Health is likewise a creature of the Legislature, from which its powers are inherited. The Department has no *inherent* jurisdiction to make laws or exercise the full power of the State Government. Such agencies are confined within the limits that a construction of the grants of power will assign to them and those recognizable delegated powers must be employed in a reasonable manner."

This was followed by the statement:

> "We think it axiomatic that an exertion of the police power, affecting personal rights, is, aside from other reasons, nugatory unless made in good faith for the attainment of a public object *within its cognizance.*"

From the authorities noticed it is clear a municipality an only exercise such power as is essential or incidental o subjects "within its cognizance." To be within its cogniance the end to be accomplished must be in furtherance f an established legislative policy. (*Potts* v. *Breen*, 67 Ill. 7, 39 L. R. A. 162.)

> "Regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently *defined by statute*, and when found to be within the framework of such policy." (*Panama Refining Co.* v. *Ryan, et al.*, 293 U. S. 388, 79 L. ed. 446.)

It is beyond the reach of a municipality to by ordinance, ule or regulation initiate or declare the legislative policy f the state. The reason for the delegation of limited powrs to subordinate agencies is because they have no inherent egislative authority.

Section 3 of Article 18 of the Oklahoma Constitution, quoted by respondents, demands that the charters of municipalities shall be consistent with and subject to the constitution of the state. Under the title "Municipal Corporation," 19 R. C. L., Sec. 108, notice is taken of the Oklahoma rule, and the text reads:

> "A municipality is a creature of the state, exercising *delegated* powers only and cannot under our constitution, arrogate to itself governmental powers in conflict with general laws and fixed policies of government."

The term "arrogate" has pointed application to the action of respondents in asserting the right to exercise police power as broad as that of the state itself.

Public policy and legislative policy are alike so far as the matter of the source of their creation goes, as in each case the constitution and laws enacted pursuant thereto are the decisive factors. (*Alderman* v. *Alderman*, 173 S. C. 9, 181 S. E. 897, 105 A. L. R. 102.)

> "By 'public policy' is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect to any question, the only matters which can be considered are its constitution and statutes, and the provisions of the common law as evidenced by the decisions of the courts, for the common law, as modified by the constitution and the laws of the state, is the law of the state."

> "The public policy of a state must be determined by its constitution, laws and judicial decisions and not by the varying opinion of laymen, lawyers or judges as to the demands or interests of the people." (*Hartford Fire Ins. Co.* v. *C. M. & St. P. R. Co.*, 70 Fed. 201, 30 L. R. A. 193.)

This Court in the case of *Thomas* v. *Collins*, 323 U. S. 516, 89 L. ed. 430, where speaking of personal freedoms, said:

> "That priority gives these liberties a sanctity and sanction not permitting dubious intrusions, and it is the character of the right, and not the limitation, which determines what standard governs the choice."

In each of the state statutes offered by respondent to support the broad power claimed by it, is found the common limitation, that the provisions of its charter must be "consistent with and subject to the provisions of the constitution," or shall not be "inconsistent with the constitution or law of the State of Oklahoma." Repetition of this limitation in each in the several statutes having application here, evidences the importance the legislature has attached as well as the caution exercised by it in conferring authority upon municipalities.

Cases Cited by Respondents Distinguished.

Respondents rely upon the case of *District of Columbia* v. *Thompson Company*, (U. S.) 97 L. ed. 888, to support their contention that the police power of the City of Tulsa is as broad as the police power of the state. An examination of this decision quickly reveals that it is of no help whatsoever to respondents' contention. This was a case involving racial discrimination and the real issue concerned the extent of power Congress might confer upon the District of Columbia. The court first determined that the District of Columbia held governmental status like that exercised by states or territories, and that it was within the province of Congress to invest the District of Columbia with like powers. This status, of course, carried with it power of legislation and authority to declare the legisla-

tive policy to like extent as in the case of states or territories. But as a precedent supporting like claims by municipalities brought into being by the state, the case has no application.

In the case of *DeAryan* v. *Butler*, 260 P. (2d) 98, quoting from the opinion (p. 101) we meet the confident assumption "the legislature has delegated to the State Board of Public Health the duty and powers necessary to control and regulate the purity, potability and wholesomeness of public waters in this state." It would appear that the court believed this, of itself, must be decisive of the power of the Board of Health to make use of the public waters to administer medicinal aid, and carried with it the uncontrolled authority to determine the kind of treatment, and compel its adoption, though no legislative grant of such power had been made. That this is the case is a fact established by the decision (p. 102). It affirmatively appears that the legislature granted authority for the issuance of permits to market fluoridated water. Subsequently there was submitted to the legislature a bill to permit the city to fluoridate the city water supply to accomplish the end here attempted by respondents. This legislation the legislature refused to adopt and yet the court held such action afforded no evidence of a refusal by the law making body to declare a policy to enter upon the treatment of infant tooth preservation. Just what kind of evidence the court would have required to establish to its satisfaction upon legislative opposition to the establishment of any such policy rests in hazy speculation. The court in effect held that despite contrary action by the law making authority, clothed with sole jurisdiction to declare the policy of the state, the Board of Health might usurp it, if its action involved nothing more than issuing a permit to the city to supply water containing

fluorine so long as the same was not rendered unfit for human consumption. This action was not consistent with the holding of the court that

> "The Legislature is possessed of the *entire* police power of the state, except as its power is limited by the provisions of the constitution and other laws applicable thereto."

This is a correct statement of the settled law. It follows with the certainty of mathematical demonstration, that where the "entire" police power is lodged in the legislature, only by affirmative action on its part can it be delegated to a Board of Health or the governing body of a municipality, and where on application made for such delegation of the police power to carry out a particular purpose the legislature declines to grant it, the subsequent attempt by the Board of Health to usurp the authority is an unlawful invasion of the legislative field. The court also said:

> "Such police power is an indispensable prerogative of sovereignty and may not be legally limited even though at times its operation may seem harsh, so long as it is not unreasonable and arbitrarily invoked and applied."

This pronouncement is also well grounded but it concerns only the legislative prerogative. For the same reason this power may not be limited, except as noticed, neither may it be disregarded, extended or modified in its operation by an inferior and subordinate agency of state government which owes its existence to the sovereign will.

In this case the court appears to either have missed the real question it was called upon to decide or erroneously decided it on the assumption the action taken was justified because the legislature had not affirmatively prohibited it. Of course this is not the rule. To justify its acts,

an inferior governmental subdivision must be able to point to action of the law making authority of the state, delegating to it the authority essential to give such act validity. This is the exact reverse of the apparent position taken by the court in the cited case.

At page 6 of their brief, respondents refer to the "paramount issue" involved here, as its right "under the legislative power delegated to it by the State of Oklahoma" to "enact" the ordinance involved in this litigation. Petitioners concede this is a correct statement of the issue, and are at a loss to account for the effort to inject the religious phase into the discussion when petitioners had taken no notice of it.

Attention should be directed to one erroneous factor contained in respondents' statement of the issue, *i. e.*, "* * * required the use of fluorine in water to protect the teeth of children and the public generally from dental caries." The case was submitted in the trial court upon a stipulated set of facts and one fact contained in the stipulation was that the effect of fluorine upon the adult members of the population (roughly 85%) had not been determined so the introduction of fluorine into the city water was not to protect the public generally from dental caries but to protect children under the age of twelve years. The effect of the ordinance enacted by the City of Tulsa is to make the adult population a guinea pig without their consent.

Evidence Afforded by Statutes of Public Policy with Respect to the Treatment or Control of Non-contagious Diseases.

Petitioners, complying with the rules of the Court, set out in their petition all of the statutes of the State believed to have even a remote relation to the declared public policy

of the State or the extent of any grant of police power to the City of Tulsa the limitation of the exercise of which is controlled by such policy.

Referring to the contention of petitioners that the state had never established "a policy of attempting to control any disease except those that were contagious, infectious or dangerous" and to the rejection of such contention by the Supreme Court of the state, respondents' position is that such rejection was grounded on the conclusion that as "the Oklahoma legislature had not restricted its health measures to those designed to prevent the spread of infectious, contagious or dangerous diseases" a municipality might invade such field because not expressly forbidden to do so. (Page 5 of response.) Indeed such seems to have been the position of the Oklahoma Supreme Court, for in the course of its opinion, after noticing different statutes, it said:

> "In view of the broad terms in which our Legislature has spoken on the subject, we cannot believe that it was intended to restrict its enactment of measures designed to promote the public health and welfare to those designed to prevent the spread of infectious, contagious or dangerous diseases. We think the mere reading of the statutes herein cited and others enacted by our Legislature is sufficient to show that it has not so restricted its policy, and that it has chosen to make many minimum requirements with reference to food, lodging and a myraid of subjects connected with the public health and/or welfare that have no direct connection with or relation to infectious, contagious or dangerous diseases." (Pet. for Writ, p. 14.)

The fallacy of this reasoning is that it assumes the statutes noticed, unless "restricted" would permit the exercise of other powers not granted, even though such powers

were exercised with respect to contagious or infectious diseases, even though no diseases of that nature were even inferentially related to the subject matter of a single one of the statutes referred to. Why should or how could the legislature restrict something it had not brought into being. It is not possible to either restrict or enlarge that which is non-existent. It may be conceded the legislature dealt in "broad terms" with the subjects of the laws enacted by it, but unless such laws concerned contagious or infectious diseases, there was no occasion for restricting their operation, and the fact unnecessary restrictions were not annexed affords no warrant for an arbitrary extension of their scope to take in subjects the legislature did not have in mind or sought fit to exclude. We agree that

> "The mere reading of the statutes herein cited and others enacted by our legislature is sufficient to show that it has not restricted its policy,"

but as such statutes do not declare or even suggest a policy to deal with any but non-contagious diseases there was no occasion for restriction and a failure to do so did not enlarge it. The assumption that "such a thing (meaning fluoridation) is not against public policy as declared by the Legislature" has no foundation. Indeed the record refutes it. Unless a policy is first established any action, the validity of which depends upon the existence of it, is against public policy.

Why, it may be asked, did the legislature deem it necessary to legislate (Appendix C of Petition) specifically with respect to "contagious, infectious or malarial diseases if, as contended by respondents and announced by the Supreme Court, the statutes enacted with reference to non-contagious diseases, unless "restricted," were sufficient to cover the whole field? And why, after legislating generally

with respect to this class of diseases did the legislature consider it necessary to enact special legislation for the control of venereal disease?

None of the several statutes noticed in Appendix B are even suggestive of a policy to establish a compulsory method of treatment or control of any non-infectious disease. None indicate any purpose to invest a municipality with police power of kind essential to support the action here complained of. To urge as justification for an arbitrary assumption of power that its exercise is not expressly restricted, without being able to point to any legislation expressly conferring the power in the first instance is nothing less than the assertion of a claim having no basis at all.

The simple answer to all this is that the sole legislative authority is not called upon to affirmatively point out to inferior administrative agents the impropriety of attempting to exercise powers it has never delegated to them.

Until respondents can point to some evidence to support it, the assertion (page 11 of brief) that

> "If the State has decided that the incidence of dental caries is serious enough to warrant action on its part, it is hardly for the courts to enjoin such action on the ground caries is a less serious disease than smallpox,"

indulges the assumption the state has decided caries is serious enough to warrant its attention, when the fact is the legislature has never in all the legislation enacted by it, even mentioned caries. A more correct statement than that advanced by respondents would be, that until the state had declared the fact and established a policy with respect thereto, a municipality attempting to deal with the matter is entering forbidden territory.

Some states have taken cognizance of fluoridation and

in such jurisdictions the acts of municipalities upon which police power has been conferred may follow a different rule than obtains in states like Oklahoma where there is a complete lack of legislative expression.

Where a municipality independently of any grant by the state, attempts to justify the exercise of police powers, it violates constitutional rights guaranteed by both state and federal constitutions and where the action is challenged, a federal question is raised.

Respectfully submitted,

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